

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-399

July 22, 2004

Appeal of Consumer Assistance Division
Decision #2004-17571 Regarding Tidewater
Telecom

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we find that Tidewater Telecom (Tidewater) customer Eric Powell's principal use of his telephone line is for residential service, therefore we reverse the decision of our Consumer Assistance Division (CAD).

II. BACKGROUND

On May 25, 2004, Mr. Powell contacted CAD about a dispute with Tidewater. Tidewater had changed Mr. Powell's service from residential to business (which increased his rates) upon seeing an ad Mr. Powell ran under the name "Eric Powell & Sons" in the Lincoln County News offering rototilling services. Mr. Powell objected to the change claiming his business is small and only of a seasonal nature and that his phone is primarily for residential use.

Tidewater responded that its filed terms and conditions, at Section 2, Page 4, require such a change. The Terms and Conditions state that business rates apply:

At residence locations when the customer has no regular business telephone and the use of the service either by himself, members of his household, or his guests, or parties calling him can be considered as more of a business than [sic] of a residence nature, which fact shall be indicated by advertising, either by business cards, newspapers, hand bills, billboards, circulars, motion picture screens, or other advertising matter, such as on vehicles, etc.

On June 10, 2004, CAD issued its decision finding that Tidewater had complied with its terms and conditions when it changed Mr. Powell to its business rate, as the number was being advertised for a business.

On June 15, Mr. Powell appealed CAD's decision to the Commission. Mr. Powell argues the terms and conditions are unfair as applied to a small business like his. He states he only operates four to five months a year and last year his business earned less than \$1,300, from a total of nine jobs.

The CAD requested additional information from Tidewater asking it to explain how it reconciles its terms and conditions that require the service to be more of a business than a residence in nature, an apparent quantitative measure, with the phrase that follows that allows this to be determined by advertising alone. Tidewater responded that there is no contradiction because the “tariff is clear that when a business advertises it shall be considered to have a business nature and shall be treated as a business.” Tidewater claims that any other measure of business use would be too subjective and time-consuming to administer and that most ILEC’s follow a similar practice which has been previously upheld by the Commission.

III. DECISION

We recognize that other independent telephone companies in Maine use a definition identical or similar to the one included in Tidewater’s tariffs.¹ Despite that fact, Tidewater’s terms and conditions do contain internal contradictions that make them difficult to interpret. In addition to the language quoted above as to when business rates will be applied, Tidewater’s Terms and Conditions at Section 3, Page 1 contain the following definition of business service:

Telephone service furnished to customers where the actual or obvious use is principally or substantially of a business, professional or occupational nature.

Likewise the definition of “residence service” is “telephone service furnished to customers when the actual or obvious use is principally for domestic purposes.” Both the definitions and the application language in Section 2 appear to require a quantitative measure of more business use than residential use to have a phone considered a business line. Yet the terms and conditions seem to allow any public advertising to trigger the application of the business rate in cases where a residence has one phone, regardless of whether any business activity ever occurs.

¹ We note that some ILECs have revised their terms under which business rates apply. For example, the terms and conditions for China, Maine Telephone, Northland, Sidney and Standish Telephone companies provide:

At residence locations when the customer has no regular business telephone and the use of the service either by himself, members of his household, or his guests, or parties calling him can be considered as more of a non-incidental business nature, rather than of a residence nature, evidence of which shall include advertising, either by business cards, newspapers, hand bills, bill boards, circulars, motion picture screens, or other advertising matter, such as on vehicles, etc.

This requires the business use to be more than incidental in nature. Presumably under these terms and conditions a customer who advertises a business but who can demonstrate little business use of the phone can have the line treated as residential.

We find that the definition of business service in Section 3 and the description of when business rates will apply in Section 2 contain contradictory provisions and therefore create an ambiguity as to how they should be applied. Our practice is to construe ambiguous tariff terms against the utility, as we would a drafter of a contract. The definition of business service includes a requirement that the use be principally or substantially of a business, professional or occupational nature. Under the Application of Business Rates section, business rates can be applied to a line at a residence where the service used can be considered as more a business than of a residential nature "which fact shall be indicated by advertising... ." It is difficult to interpret this phrase. The term and condition could clearly state if a business advertises a phone number, that line will be charged at business rates, but it does not. The term "indicated" could mean that advertising is only one criteria to be considered in determining if business is the principal use.

We understand the difficulty of the utility having to judge each customer individually. However, the language in the tariff creates a situation where such judgment is necessary. Business rates are charged when a line is primarily used for business. There are a variety of indicators that the utility can apply in making that determination. Tidewater may want to revise the language in its terms and conditions or, in the future, consider eliminating the rate distinctions between residential and business rates if it has difficulty in administering its present terms and conditions.

In this instance Mr. Powell's business use of the phone appears to be substantially less than his residential use given the limited nature of his business (nine jobs worth \$1,300 during the summer season). Therefore, we reverse the CAD's decision and direct Tidewater to treat Mr. Powell's line as a residential line.

Dated at Augusta, Maine, this 22nd day of July, 2004.

BY ORDER OF THE COMMISSION

Raymond J. Robichaud
Acting Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Diamond
 Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.